RECORD
AND
BRIEFS

No. 15-457

IN THE
Supreme Court of the United States

MICROSOFT CORPORATION,

Petitioner,

v.

SETH BAKER, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF PUBLIC CITIZEN, INC. AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS CURIAE[1]

Public Citizen, Inc., a national consumer-advocacy organization, appears before Congress, administrative agencies, and courts to work for enactment and enforcement of laws protecting consumers, workers, and the general public. Public Citizen often represents consumer interests in litigation, including as amicus curiae in this Court and the federal courts of appeals.

Public Citizen has a longstanding interest in protecting the right of access to the civil justice system and the use of class actions in appropriate cases to facilitate such access. Those interests are threatened by overly broad arguments that courts lack subject-matter jurisdiction over plaintiffs' claims. As a result, Public Citizen and its attorneys have participated, either as amicus curiae or as counsel for parties, in many cases in which defendants have argued that courts lack Article III jurisdiction over class claims after the named plaintiffs' individual claims have allegedly been rendered moot. These cases include *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663 (2016), and *Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523 (2013).

Public Citizen is filing this brief to address the petitioner's argument that this case is moot if appellate review cannot reinstate the named plaintiffs' individual claims. *See* Pet'r Br. 39-41. This argument misunderstands this Court's class-action mootness precedents and, if accepted, would thwart plaintiff classes from obtaining recoveries to which they are entitled.

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[1] This brief was not authored in whole or in part by counsel for a party. No one other than amicus curiae made a monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief, and letters of consent have been lodged with the Court.

SUMMARY OF ARGUMENT

In *United States Parole Commission v. Geraghty*, 445 U.S. 388 (1980), and *Deposit Guaranty National Bank v. Roper*, 445 U.S. 326 (1980), this Court considered whether, in a case brought on behalf of a class, the termination of the named plaintiffs' individual claims after the district court denied class certification mooted the case and deprived the court of appeals of jurisdiction to review the denial of class certification. In both cases, the Court held that the case was not moot and that the plaintiffs maintained a sufficient personal stake in the class claims to appeal the class certification denial.

This case now presents the question (among others) whether a class action becomes moot if the named plaintiffs' individual claims are terminated through a dismissal with prejudice after the district court denies class certification. Under the reasoning of *Geraghty* and *Roper*, the case is not moot. Regardless of whether the named plaintiffs' individual claims can be reinstated, the plaintiffs maintain a sufficient personal stake in the class claims for the court of appeals to review the denial of class certification.

Indeed, named plaintiffs who dismiss their claims so that they can appeal the denial of class certification have the same stake in class certification as named plaintiffs who have litigated their individual claims to a favorable final judgment. It is well settled that courts have jurisdiction over appeals from denials of class certification brought under those circumstances. *See Coopers & Lybrand v. Livesay*, 437 U.S. 463, 469 (1978).

As this Court has recognized, the decision whether to certify a class will often be the most important decision in a case. *See Roper*, 445 U.S. at 339. The mootness

principles set forth in this Court's precedents ensure that, when a district court erroneously denies class certification, the court of appeals is able to review and reverse that denial, regardless of whether the passage of time, acts of defendants, or impracticalities of litigating small claims lead to the final termination of the named plaintiffs' individual claims. The Court's precedents help make certain that a district court's erroneous denial of class certification does not irrevocably deprive the courts of the efficiency and economy of scale served by the class-action device or keep plaintiffs with meritorious claims from being able to join together to vindicate their rights.

ARGUMENT

I. The Respondents Have a Sufficient Personal Stake in Class Certification to Satisfy Article III.

Mootness doctrine is grounded in Article III's "case-or-controversy limitation on federal judicial authority." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180 (2000). "To enforce this limitation," a party must demonstrate a "personal stake" in the suit both at the beginning of the case and throughout the course of the litigation. *Camreta v. Greene*, 563 U.S. 692, 702 (2011).

This Court has repeatedly recognized that a named plaintiff whose individual claims have ended retains a sufficient personal stake in the case to appeal a denial of class certification. In *Geraghty*, 445 U.S. at 404, the Court held that the expiration of the named plaintiff's individual claim after the denial of class certification does not moot an appeal of that denial, because the plaintiff maintains a sufficient personal stake in class certification to satisfy Article III. In *Roper*, 445 U.S. at 333, the Court held that a tender to named plaintiffs of the amounts

they claim individually, followed by entry of judgment in their favor, does not moot a case where the plaintiffs retain an economic interest in the class claims. And in *Livesay*, 437 U.S. at 469, the Court recognized that named plaintiffs who litigate their case to a final judgment after the denial of class certification can appeal the denial of class certification after judgment is entered on their individual claims. Likewise, here, even if the respondents' claims cannot be reinstated on appeal, they have a sufficient personal stake in the class action to appeal the denial of class certification.

A. In *Geraghty*, the Court held that named plaintiffs maintain a sufficient personal stake in class certification to appeal the denial of class certification after their individual claims become moot. 445 U.S. at 404. *Geraghty* was a challenge to the U.S. Parole Commission's parole release guidelines, brought by a prisoner on behalf of a class. The district court denied the plaintiff's motion for class certification and granted summary judgment for the defendant. *Id.* at 393. While both issues were on appeal, the plaintiff was released from prison, thereby mooting his individual claim. *Id.* at 394. The question thus arose whether his release from prison mooted the appeal of the denial of class certification. The Court held that it did not: We "hold that an action brought on behalf of a class does not become moot upon expiration of the named plaintiff's substantive claim, even though class certification has been denied." *Id.* at 404.

The Court explained that a "plaintiff who brings a class action presents two separate issues for judicial resolution": "the claim on the merits" and "the claim that he is entitled to represent a class." *Id.* at 402. "[W]hether the plaintiff may continue to press the class certification claim, after the claim on the merits 'expires,' ... requires

reference to the purposes of the case-or-controversy requirement." *Id.* "[T]he purpose of the 'personal stake' requirement," the Court determined, "is to assure that the case is in a form capable of judicial resolution," with "sharply presented issues in a concrete factual setting and self-interested parties vigorously advocating opposing positions." *Id.* at 403. The Court concluded that these requirements could be met "with respect to class certification notwithstanding the fact that the named plaintiff's claim on the merits has expired." *Id.* Even if his individual claim on the merits has expired, a named plaintiff can retain "a 'personal stake' in obtaining class certification sufficient to assure that Art. III values are not undermined." *Id.* at 404.

Even assuming that the named plaintiffs' dismissal of their individual claims with prejudice irrevocably bars the plaintiffs from pursuing those claims, this case presents a situation almost identical to that in *Geraghty*. As in *Geraghty*, the named plaintiffs' claims were resolved after the denial of class certification. As in *Geraghty*, the "question whether class certification is appropriate remains as a concrete, sharply presented issue." *Id.* at 403-04. And as in *Geraghty*, the respondents "continue[] vigorously to advocate [their] right to have a class certified." *Id.* at 404.

The only difference between this case and *Geraghty* is that, in *Geraghty*, the plaintiff's claim became moot because of the passage of time, whereas, here, the plaintiffs voluntarily dismissed their claims with prejudice. According to Microsoft, that distinction deprives respondents of the personal stake in class certification recognized in *Geraghty* if their claims cannot be reinstated based on the reversal of the district court's denial of certification. Pet'r Br. at 39-40. To the

contrary, that the respondents dismissed their claims with prejudice and thus took the risk that those claims might be irrevocably lost in order to appeal the class certification denial demonstrates the vigor with which the respondents have advocated for class certification—a vigor that surpasses even that in *Geraghty*.[2] Unlike the plaintiff in *Geraghty*, whose claim became moot when he was released from prison, respondents jeopardized their personal claims and their individual rights to recover so they could vindicate the interests of the class. Under these circumstances, the personal-stake requirement is met "with respect to the class certification issue notwithstanding the fact that the named plaintiff's claim on the merits has expired." *Id.* at 403.

B. Microsoft downplays *Geraghty* by discussing the case in tandem with *Roper*, 445 U.S. 326, in which the Court held that an economic interest in class certification, such as an interest in shifting costs, can, on its own, provide a sufficient personal stake in class certification to allow a plaintiff whose individual claim is satisfied to appeal a denial of class certification. Microsoft contends that plaintiffs who have voluntarily dismissed their claims have no interest in shifting costs. Microsoft also notes that, in *Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523, 1532 n.5 (2013), the Court questioned *Roper*'s continuing validity in light of a statement in *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 480 (1990), that an interest in attorneys' fees does not create an Article III case or controversy.

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[2] In this sense, plaintiffs who dismiss their individual claims contrast starkly with plaintiffs who *settle* their individual claims for a personal benefit. *See Geraghty*, 445 U.S. at 404 n.10 (intimating "no view as to whether a named plaintiff who settles the individual claim after denial of class certification may ... appeal from the adverse ruling on class certification").

Microsoft is wrong about the application of *Roper*. Whether the plaintiff has an interest in shifting costs turns on whether the plaintiff will be successful on behalf of the class, not on whether she has been successful in her own right. Plaintiffs who have voluntarily dismissed their claims can retain as much interest as plaintiffs whose claims have been satisfied in "shift[ing] to successful class litigants a portion of those fees and expenses that have been incurred in th[e] litigation." *Roper*, 445 U.S. at 334 n.6. *Cf. Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980) (discussing attorneys' fees to a litigant "who recovers a common fund for the benefit of persons other than himself"); *see also Espenscheid v. DirectSat USA, LLC*, 688 F.3d 872 (7th Cir. 2012) (determining that plaintiff who settled individual claim had continuing economic interest in class certification).

This Court does not need to decide whether *Roper* applies here, however, or whether *Roper* was affected by *Lewis*, because, regardless, *Geraghty* demonstrates that the personal stake a plaintiff may have in pursuing class certification is not limited to the economic interest discussed in *Roper*. *See Geraghty*, 445 U.S. at 417 (Powell, J., dissenting) (noting that, in *Geraghty*, there was no "interest in sharing costs"). Under *Geraghty*, named plaintiffs can have "a 'personal stake' in obtaining class certification," regardless of whether they have an economic stake in the class claims. *Id.* at 404. Respondents have that personal stake here, and it is "sufficient to assure that Art. III values are not undermined." *Id.*

C. In addition to having the same personal stake in class certification as named plaintiffs whose claims have expired, named plaintiffs who dismiss their claims with prejudice have (if their claims cannot be reinstated) the

same personal stake in class certification as named plaintiffs who litigate their claims to a favorable judgment on the merits.

It is well-settled that courts have jurisdiction to review a denial of class certification after a final judgment on the merits of the individual claims. As this Court stated in *Livesay*, "an order denying class certification is subject to effective review after final judgment at the behest of the named plaintiff or intervening class members." 437 U.S. at 469; *see also, e.g.*, *United Airlines, Inc. v. McDonald*, 432 U.S. 385, 393 (1977) ("The District Court's refusal to certify was subject to appellate review after final judgment at the behest of the named plaintiffs[.]").

Indeed, this Court has noted that the "appealability of the class certification question *after* final judgment on the merits was an important ingredient of [the] ruling in *Livesay*." *Roper*, 445 U.S. at 337-38. Likewise, the ability of named plaintiffs to appeal denials of class certification after favorable judgments on the merits is an important part of Microsoft's argument here. *See* Pet'r Br. 40; *id.* at 18 (describing appealing after a successful final judgment on the merits to be a "*sure path* to appellate review" (quoting Fed. R. Civ. P. 23 advisory committee's note to 1998 amendment)).

If their claims cannot be reinstated, named plaintiffs who have dismissed their individual claims with prejudice have the same personal stake in the class certification decision as plaintiffs who have litigated their claims to a favorable final judgment. In both cases, the plaintiffs lost their motions for class certification and are seeking to appeal that issue after final judgment. In both cases, the plaintiffs' individual claims are over and will not be at issue in the appeal. *See, e.g.*, *Roper*, 445 U.S. at

333 ("We can assume that a district court's final judgment fully satisfying named plaintiffs' private substantive claims would preclude their appeal on that aspect of the final judgment."). And in both cases, the named plaintiffs may—or may not—have an economic interest in the class certification decision, such as an interest in shifting the costs of litigating the class action to other members of the class.

Microsoft argues that the fact that the respondents consented to dismiss their claims with prejudice deprives them of any personal stake in class certification. Pet'r Br. 15. But plaintiffs who litigate their claims to a favorable judgment on the merits likewise ask for judgment to be entered, yet can appeal the denial of class certification. Microsoft also argues that plaintiffs who dismiss their claims with prejudice should not be able to appeal the denial of class certification because they "were free to litigate their individual claims to conclusion" and appeal then. Pet'r Br. 40. In so arguing, Microsoft recognizes that resolution of an individual claim does not necessarily moot an appeal of the class certification decision, and it fails to offer a doctrinal basis to explain why the litigant in the successfully litigated case can appeal but the litigants here cannot. The respondents have the same personal stake in the class certification decision that they would have if they had litigated to a favorable final judgment on the merits, and, regardless of whether their individual claims can be reinstated, the case is not moot.

II. Reversal of the Denial of Class Certification Relates Back to the Date of the Denial.

In addition to its personal-stake analysis, *Geraghty* provided an alternative basis for its holding: "that when a District Court erroneously denies a procedural motion, which, if correctly decided, would have prevented the

action from becoming moot, an appeal lies from the denial and the corrected ruling 'relates back' to the date of the original denial." 445 U.S. at 404 n.11.

Like *Geraghty*'s personal-stake analysis, *Geraghty*'s relation-back analysis applies equally whether the named plaintiff's case has been mooted by the passage of time or whether the plaintiff has voluntarily dismissed his claims with prejudice. In either situation, if the court of appeals reverses a denial of class certification, that "corrected ruling on appeal 'relates back' to the time of the erroneous denial of the certification motion," *Genesis*, 133 S. Ct. at 1530, and the class is deemed to have been certified on that date. Once there is a certified class, that class has an "independent legal status," *id.*, and its interests suffice to satisfy the case or controversy requirement. Thus, under *Geraghty*'s alternative analysis, the termination of the named plaintiff's individual claim does not affect the courts' subject-matter jurisdiction over the case, regardless of why the named plaintiff's individual claim has ended. *See Franks v. Bowman Transp. Co.*, 424 U.S. 747 (1976); *Sosna v. Iowa*, 419 U.S. 393 (1975).

Microsoft contends that *Geraghty*'s relation-back analysis "'comes into play only when a court confronts a jurisdictional gap—an individual claim becoming moot before the court can certify a representative action,'" and that it therefore does not apply where the named plaintiffs voluntarily dismiss their claims. Pet'r Br. 40 (quoting *Genesis*, 133 S. Ct. at 1536 (Kagan, J., dissenting)). This argument confuses two separate relation-back doctrines. In addition to the relation-back doctrine discussed in *Geraghty*, in which a corrected ruling on class certification relates back to the date of denial of class certification, this Court has recognized

that, in certain circumstances "in which the controversy involving the named plaintiffs is such that it becomes moot as to them before the district court can reasonably be expected to rule on a certification motion, ... certification can be said to 'relate back' to the filing of the complaint." *Sosna*, 419 U.S. at 402 n.11; *see also, e.g.*, *Swisher v. Brady*, 438 U.S. 204, 213 n.11 (1978). It is only in this second type of relation back—relation back to the date of the filing of the class-action complaint—where a jurisdictional gap exists before the district court has the opportunity to certify a class action. In the relation-back scenario discussed in *Geraghty*—relation back to the denial of class certification—the district court *had* the opportunity to certify a class action, but erroneously decided not to.

Rather than arising when the individual claim is resolved before the district court has the opportunity to consider class certification, the "jurisdictional gap" addressed in *Geraghty* arises when the individual claim is resolved after an erroneous denial of certification but before that ruling can be corrected on appeal. That gap is the same regardless of whether the named plaintiff's claim is resolved through mootness or because the named plaintiff dismissed his claim because he cannot afford to litigate the case on an individual basis. In either circumstance, there is a period between the date on which the named plaintiff's claim ends and the date on which the appellate court reverses the denial of class certification when no named plaintiff has a live individual claim. In that scenario, the appellate reversal of the erroneous decision relates back to the date of that decision and prevents termination of the named plaintiff's individual claim from mooting the appeal.

III. The Court's Mootness Precedents Protect Sound Judicial Administration.

The class-action mechanism serves important purposes. It enables injured people to come together to obtain relief, *see Roper*, 445 U.S. at 339, and furthers "efficiency and economy of litigation," *Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 553 (1974). When the requirements of Federal Rule of Civil Procedure 23 are met but the district court nonetheless denies class certification, and when the plaintiff has no means of appealing the district court's erroneous denial of class certification, the purposes underlying the class-action mechanism are undermined and both litigants and courts are deprived of the efficiencies class actions provide.

The denial of a motion for class certification generally cannot be appealed until the litigation has ended on the merits of the individual claim. *See Livesay*, 437 U.S. 463. As a practical matter, however, the named plaintiffs' claim often will not survive to be decided on the merits. Sometimes those claims will expire because of the passage of time. Other times they will end through acts of the defendant. And still other times, the costs of litigating small claims will prevent plaintiffs from being able to continue to litigate their individual claims, and they will dismiss those claims before litigating to a judgment on the merits.

Microsoft argues that the Court should only recognize continued jurisdiction when defendants' actions or the passage of time thwart potentially meritorious class actions, not when the practicalities and costs of litigation do so. But Microsoft provides neither a distinction grounded in Article III nor a reason why sound judicial administration would counsel in favor of appellate review in one situation but not the other. None

of these circumstances implicate *Livesay*'s concerns about interlocutory appeals. And in all, dismissing the appeal would multiply the effects of the district court's erroneous denial of class certification and would deny the parties and courts the benefits of a properly certified class action.

This Court has recognized that a "district court's ruling on the certification issue is often the most significant decision rendered in ... class-action proceedings." *Roper*, 445 U.S. at 339. The Court should reject Microsoft's plea to adopt an arbitrary distinction that would strip the federal appellate courts of jurisdiction to review a category of these significant decisions.

CONCLUSION

For the foregoing reasons, the Court should hold that it has jurisdiction over the class claims.

Respectfully submitted,

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